FILED
FEB 12 2003
OFFICE OF THE CLERK

No. 02-1054

IN THE
Supreme Court of the United States

SYLVIA SCOTT, *et al.*,
Petitioners,

v.

PASADENA UNIFIED SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

MAREE F. SNEED
PATRICIA A. BRANNAN*
ALEXANDER E. DREIER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-8686

* Counsel of Record

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the court below was correct in holding that Petitioners' claims presented no justiciable case or controversy on either of two grounds -- that they lacked standing or that their claims were not ripe for review -- where the challenged provision of school district policy was never applied to Petitioners or any other student and the record amply demonstrated that any possible future injury depended on a speculative chain of unknowable events.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
REASONS FOR DENYING THE WRIT	2
I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT	2
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
CASES:	
Abbott Labs. v. Gardner, 387 U.S. 136 (1967)	6
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)	4
City of Los Angeles v. Lyons, 461 U.S. 95 (1983)	4, 5
Farmer v. Ramsay, 43 Fed. Appx. 547, 2002 WL 1766615 (4th Cir. Aug. 1, 2002)	5
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	4
Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993)	5
O'Shea v. Littleton, 414 U.S. 488 (1974)	5
Rosenfeld v. Montgomery County Pub. Schs., 25 Fed. Appx. 123, 2001 WL 1658893 (4th Cir. Dec. 27, 2001)	5
Texas v. United States, 523 U.S. 296 (1998)	6
RULE:	
S. Ct. Rule 10	2

IN THE

Supreme Court of the United States

No. 02-1054

SYLVIA SCOTT, *et al.*,

Petitioners,

v.

PASADENA UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

INTRODUCTION

Petitioners Sylvia Scott, *et al.* ("Scott" or the "Scott Petitioners") brought this action against Respondents the Pasadena Unified School District, *et al.* ("PUSD") in March 1999. Scott argued that PUSD's policy then in effect for assigning students to three of its magnet schools (known in the school district as "voluntary schools") should be declared unlawful on its face because it provided for the possibility of consideration of race, ethnicity, gender and other factors in admission lotteries, although the policy prohibited consideration of those factors except in the narrow circumstance where it was necessary to avoid segregation. Pet. App. 8a. Scott argued that her objection to the mere existence of that

provision of the policy, BP 0460(d)(8),[1] gave rise to a justiciable case or controversy, even though (1) the provision was in effect for only one school year and was not applied to any student, including Petitioners, because the narrow conditions necessary for its application were not met, *id.* at 10a, 17a, 22a n.17, 27a, and (2) whether the provision would ever be applied in the future in a manner harmful to Petitioners depended on a chain of contingencies resting on multiple assumptions that rendered any possible future injury to Petitioners highly speculative and abstract. *See id.* at 26a. The court of appeals held that because neither the Scott Petitioners nor any other student was ever subjected to different treatment on the basis of race, ethnicity or gender under the challenged policy, and the possibility of unequal treatment in the future was purely speculative, Petitioners' hypothetical objection to the policy gave rise to no justiciable case or controversy. *Id.* at 28a. The court of appeals provided two alternative grounds for dismissal: that Scott lacked standing and that her claims were not ripe for review. This Court should deny the Petition because neither ground meets the standard of Supreme Court Rule 10, and either is sufficient to support the court of appeals' judgment.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY COURT.

1. Scott argues that she had standing to challenge BP 0460(d)(8) because she "submitted applications for seats at

---

[1] It is telling that the Petition includes few references to BP 0460(d)(8), the voluntary schools lottery provision that was at issue below. Instead, the Petition focuses on a different provision -- BP 0460(c)(3) -- that does not refer to voluntary schools or a lottery. To the extent Scott now asserts standing to challenge BP 0460(c)(3), that issue was not presented to the district court or passed upon by either of the courts below. *See* Pet. App. 6a-7a n.5. For that reason alone, this Court should disregard Scott's eleventh-hour reliance on this new provision.

the voluntary schools and intends on submitting applications for the coming years," and that these "salient facts" alone bring her "fully within the sphere of standing * * *." Pet. 11. As the court of appeals held, the operation of the policy at issue shows the abstract and hypothetical nature of Scott's claims. BP 0460(d)(8) provided that if a voluntary school received more applications than it had seats available, after siblings of current students were admitted, PUSD would hold a computerized lottery for the remaining seats. Pet. App. 8a. The policy permitted PUSD to consider gender, race or ethnicity, socioeconomic status, language and special needs as factors in the lottery process for a voluntary school, but these factors could only be considered "'when necessary to create an integrated setting.'" *Id.* (quoting BP 0460(d)(8)). Use of these factors was further restricted to the selection of students for the entering grade of each voluntary school (kindergarten for two of the voluntary schools; eighth grade for the other). *Id.*

As both lower courts found, PUSD never applied the provision Petitioners challenged. The provision was in effect for only one school year -- 1999-2000. That year one voluntary school, John Marshall, was under-subscribed and thus admitted all applicants, and the other voluntary schools, Norma Coombs and Don Benito, held race- and gender-neutral lotteries because taking race, gender or any of the other possible factors into account was not necessary to create an integrated setting. Pet. App. 9a-10a. Before the 2000-2001 school year, PUSD suspended the policy and has not reinstated it. Thus, the challenged provision that raised the mere *possibility* of consideration of gender, race and ethnicity in voluntary school admissions was not applied in

the sole year of its existence.[2] Based on these facts and the entire record, the court of appeals held that this case "involves neither a limitation on the number of seats made available to students of a particular racial or gender group nor a classification of students by race or gender in order to move them into separate lottery cohorts * * *." *Id.* at 22a n.17.

In light of the record evidence demonstrating how BP 0460(d)(8) operated and the particular circumstances of these Petitioners, the court of appeals held that Scott failed to establish an injury-in-fact necessary for standing. Applying this Court's well-established precedents, the court of appeals examined whether on the record in this case '"the threat of injury is both real and immediate, not conjectural or hypothetical."' Pet. App. 18a-19a (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Given the narrow circumstances in which race, ethnicity or gender would be considered under the policy, the court noted that "Scott's professed intention to subject herself to a racial or gender weighted lottery is contingent upon an unpredictable set of societal factors that may or may not arise * * *." *Id.* at 25a; *see id.* at 21a-22a (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)) (requiring that "the injury is 'certainly impending' ") and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992). For example, if the Petitioners applied to the voluntary schools in some future year, it was unknowable whether: a lottery would be held for the school (no

---

[2] Scott asserts: "Scott submitted applications for seats at the voluntary schools." Pet. 11. Three of the Scott Petitioners did not apply to any voluntary school. Pet. App. 9a. Seven of the eight Petitioners never were denied admission to any voluntary school for which they applied. *See id.* at 10a. The only Petitioner who was not admitted to a voluntary school for which he applied was denied admission based on a random, race- and gender-neutral lottery for that school. *Id.* at 10a & n.8. Six of the Petitioners are now beyond the grade at which they would be eligible for any lottery, and for that reason the court of appeals held their claims to be moot, *id.* at 19a, a ruling not challenged in the questions presented.

lottery is held if the school is under-subscribed, as was the case with John Marshall in 1999-2000); if a lottery were held, whether it would include consideration of race, ethnicity or gender (those factors would only be considered if necessary to prevent segregation); if such factors were considered, whether they would operate in a manner that harmed or benefited the Petitioner (Petitioners are of different races and genders; if any given student belonged to a group underrepresented in the applicant pool, for example, he or she would receive a "plus" in the lottery). Pet. App. 17a and n. 12. *See Lyons*, 461 U.S. at 102 (requiring a " 'real and immediate threat of * * * injury' ") (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)).

The court of appeals addressed Scott's argument concerning *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). That case supports the court of appeals' decision. In *Northeastern Florida*, this Court held that " 'injury in fact' in an equal protection case * * * is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 666. As the court of appeals in this case correctly held, PUSD never imposed a race- or gender-based "barrier" to Scott's application to any voluntary school. The court of appeals holding is consistent with those of other federal courts of appeals that have addressed similar circumstances. *See, e.g., Farmer v. Ramsay*, 43 Fed. Appx. 547, 2002 WL 1766615 (4th Cir. Aug. 1, 2002); *Rosenfeld v. Montgomery County Pub. Schs.*, 25 Fed. Appx. 123, 129-130, 2001 WL 1658893 (4th Cir. Dec. 27, 2001). The other question *Northeastern Florida* addressed -- whether plaintiffs must show that they would have obtained the sought-after benefit absent the challenged racial barrier, *id.* -- simply is not at issue in this case. *See* Pet. App. 20a-21a.

2. The court of appeals also held that Scott's claims were not ripe for review because they rested " 'upon contingent

future events that may not occur as anticipated, or indeed may not occur at all.' " Pet. App. 29a (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)) (internal quotations and citation omitted). The court noted that the factual record in this case was not sufficiently well-developed to permit adjudication of Scott's claims, *id.* at 30a, the court's review "would stand on a much surer footing in the context of a specific application" of BP 0460(d)(8), *id.* at 32a (internal quotation and citation omitted), and in light of the record there was no hardship to Scott in declining to rule on her equal protection challenge. *Id.* That holding was consistent with this Court's well-established precedents, which hold that federal courts should decline to adjudicate a plaintiff's abstract objection to a law or a governmental policy. *See, e.g., Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

3. The Petition describes the policy and events at issue in this case in the present tense, *e.g.*, Pet. 3, suggesting that BP 0460(d)(8), is still operative. It is not; PUSD has suspended consideration of race, ethnicity and gender in its student assignment policy. Pet. App. 11a. For that reason, the injury Scott alleges is now even more speculative than it was when she brought this action. Although the court of appeals vacated the district court order in this case that barred PUSD from considering such factors, PUSD has not determined whether it would do so in the future. Thus, in its current posture, PUSD is no different than any local, state or federal governmental agency that might conceivably in the future promulgate a race-conscious policy but does not currently have one in place. Scott's objection to that abstract possibility does not give rise to a justiciable case or controversy with PUSD any more than it would with those other agencies.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

MAREE F. SNEED
*PATRICIA A. BRANNAN
ALEXANDER E. DREIER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-8686

* Counsel of Record

Counsel for Respondents